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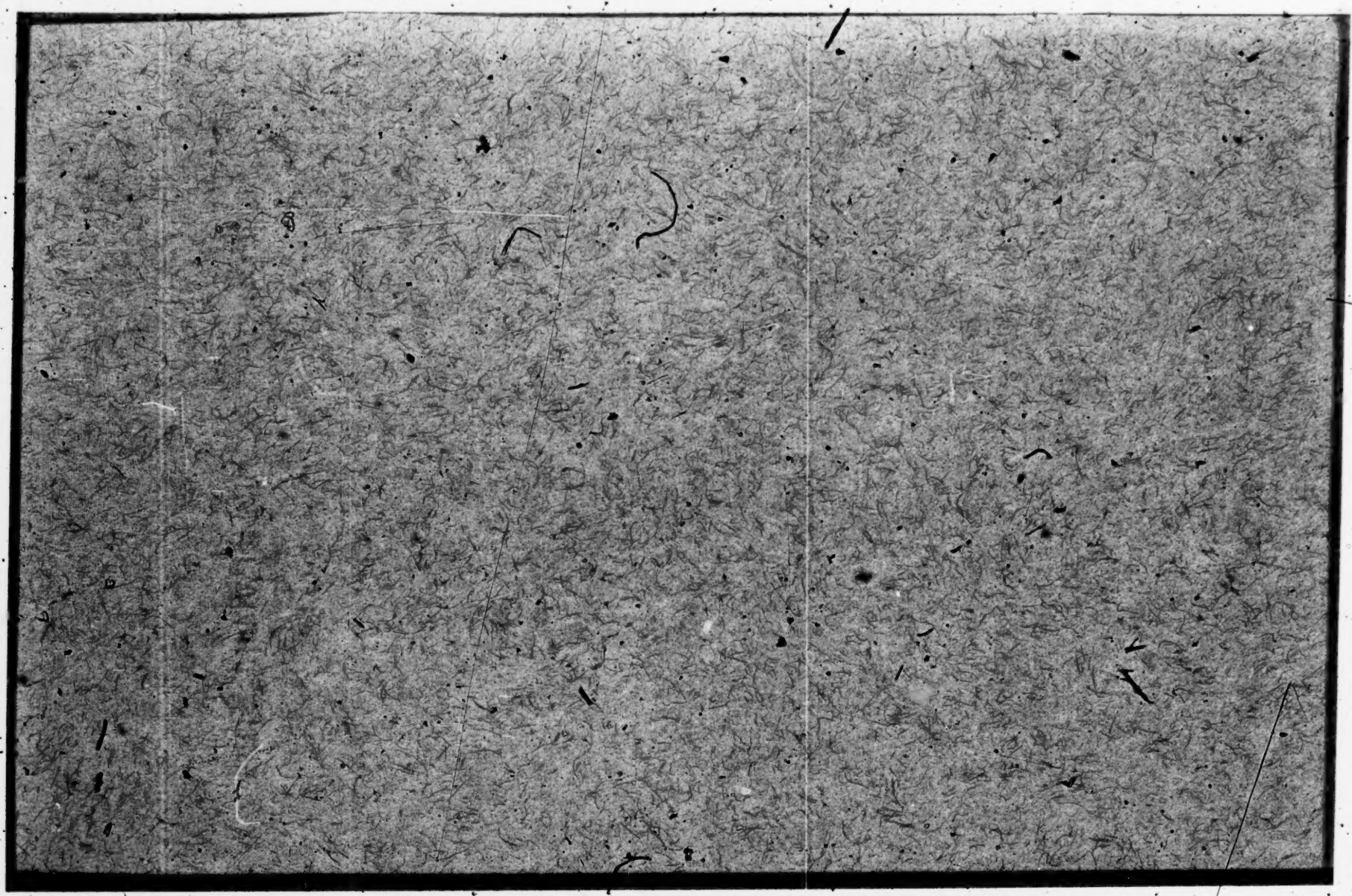

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 639

WALTER GROOMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1970 (Pet. App. B). Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to August 30, 1970. The petition was filed in this Court on September 1, 1970, and is therefore out of time under Rule 22(2). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

406-672—70

QUESTIONS PRESENTED

1. Whether the verdict was contrary to the weight of the evidence.

2. Whether the refusal to delay the trial, to permit examination of a witness' testimony at a previous trial allegedly at odds with his testimony in the trial below, deprived petitioner of due process.

3. Whether the trial court erred in denying petitioner's motion for severance.

4. Whether petitioner is entitled to interpose his Fifth Amendment privilege against self-incrimination in defense of his failure to comply with the federal liquor tax statutes.

STATEMENT

After a jury trial, petitioner and three co-defendants were convicted of selling liquor in violation of 26 U.S.C. 5604(a)(1) and of conspiring to commit that offense in violation of 18 U.S.C. 371. Petitioner was sentenced to two years' imprisonment for the substantive offense and five years' probation for the conspiracy. The court of appeals affirmed.

A government undercover agent, William Reece, testified that on January 15, 1969 he made initial arrangements for the purchase of whiskey with a co-defendant, Billy Allen (Tr. 24–26). The next day Agent Reece met Allen and co-defendant Clayton Williamson at Williamson's store, where final arrangements were made. It was agreed that Agent Reece would go with Williamson and pay $288 cash for twelve cases (72 gallons) of whiskey (Tr. 30). The two men then drove to petitioner's house (Tr. 31), Williamson driving. When they arrived, petitioner

came out and instructed them to drive to the top of the hill and said he would "send it on up" (Tr. 32). They drove as directed by petitioner. Shortly thereafter co-defendant Drury Whitlock arrived with a car full of cases of tax unpaid whiskey (Tr. 36) for which Reece paid.

Petitioner denied seeing Reece on the day in question or giving directions to Williamson (Tr. 121–122). His brother Leroy Grooms, Williams, and another man, Homer Whitlock, testified that it was Leroy and not petitioner who had given the directions. They testified that Williamson asked for Drury Whitlock and Leroy responded with directions left with him by Drury Whitlock (Tr. 137–138, 153–154, 208). Leroy Grooms and Homer Whitlock testified that petitioner was not present at the time (Tr. 138, 154).

ARGUMENT

1. Petitioner's attack on the sufficiency of the evidence rests on the proposition that the jury should have believed his witnesses rather than agent Reece. The issue of credibility was for the jury to resolve. *United States* v. *Creek*, 403 F. 2d 220 (C.A. 6); see *Hiram* v. *United States*, 354 F. 2d 4 (C.A. 9).

2. At the conclusion of the case for the defense, defense counsel moved for an adjournment in order to determine if the testimony of Mr. Reece as to the amount of beer he drank when he made arrangements to buy the liquor was inconsistent with testimony he gave at a prior trial. The court declined to interrupt the trial (Tr. 222–224). Petitioner now argues that if he had been allowed to obtain the transcript, he

could have shown that Reece's testimony was inconsistent as to whether he saw a whiskey bottle on the table when the arrangements were made. As the district court held in denying petitioner's motion for new trial (Pet. App. A 31–32), this minor inconsistency has no significance.

3. Before trial, petitioner moved for a severance, asserting that, if tried separately, Druiry Whitlock would testify for petitioner. It was established, however, that if severance were granted and petitioner were tried first, Whitlock definitely would not testify (Tr. 6). The denial of the motion for a severance was therefore justified. Since petitioner had no right to demand that Whitlock's trial go first (*Wright* v. *United States*, 356 F. 2d 261 (C.A. 5), certiorari denied, 385 U.S. 861), his claim that he would benefit from a severance was speculative. And the "unsupported possibility that such testimony might be forthcoming does not make the denial of a motion for severance erroneous." *United States* v. *Kahn*, 381 F. 2d 824, 841 (C.A. 7), certiorari denied, 389 U.S. 1015.

Not until after Whitlock and petitioner had been convicted did Whitlock submit an affidavit declaring he would testify that petitioner had no knowledge or connection with the liquor sale in question and that he (Whitlock) had asked Leroy, not petitioner, to give directions to anybody looking for him. This merely reiterated the testimony at the trial, including that of co-defendant Williamson, which the jury had not credited.

4. Petitioner argues that his prosecution for failure to comply with 26 U.S.C. 5205(a)(2) and 5604(a)(1)

abridged his Fifth Amendment right against self-incrimination.[1] The contention that noncompliance with the federal liquor tax statutes may not be criminally prosecuted because of the privilege against self-incrimination has been uniformly rejected by all courts of appeals which have considered it. *E.g.*, *United States* v. *Fricano*, 416 F. 2d 434 (C.A. 2); *United States* v. *Hunt*, 419 F. 2d 1 (C.A. 3), certiorari denied, 397 U.S. 1016; *United States* v. *Walden*, 411 F. 2d 1109 (C.A. 4), certiorari denied, 396 U.S. 931; *United States* v. *Dryden*, 423 F. 2d 1175 (C.A. 5), certiorari denied, 398 U.S. 950; *United States* v. *Whitehead*, 424 F. 2d 446 (C.A. 6). The statutory scheme relating to liquor is not aimed at all liquor but only at preventing unlawful production and sale of liquor; thus its provisions do not require disclosures of otherwise incriminating matters or affect a select group inherently suspect of criminal activity.

CONCLUSION

For the reasons stated above it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1970.

[1] The same issue is presented in *Hooper* v. *United States*, Nos. 620 and 640, and *Whitlock* v. *United States*, No. 5790, this Term.

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